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NEW HAMPSHIRE CODE OF ADMINISTRATIVE RULES

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# NEW HAMPSHIRE CODE OF ADMINISTRATIVE RULES

## CHAPTER Env-WtC 100 DEFINITIONS, ORGANIZATION AND PUBLIC INFORMATION

Statutory Authority: RSA 21-O:5-a, VII; RSA 21-0:14, IV

### PART Env-WtC 101 PURPOSE

Env-WtC 101.01 Purpose. The purpose of this chapter is to provide organizational rules to implement the statutory responsibilities for all matters under the jurisdiction of the wetlands council created by RSA 21-O:5-a.

Source. #6652-A, eff 12-12-97

### PART Env-WtC 102 DEFINITIONS

Env-WtC 102.01 Terms Used. As used in these rules, the following terms shall have the meanings indicated:

- (a) “Appeal” means a proceeding in which the rights, duties, or privileges of a person seeking review of a final department decision are determined by the council in accordance with RSA 482-A:10.
- (b) “Bureau administrator” means the administrator of the wetlands bureau of the water division of the department of environmental services.
- (c) “Council” means the wetlands council established by RSA 21-0:5-a.
- (d) “Council clerk” means the person designated pursuant to RSA 21-0:5-a, III as clerical support staff to the council.
- (e) “Department” means the department of environmental services.
- (f) “Department’s record” means the complete copy of all information, including but not limited to documents and verbal testimony, which is available to the department at the time it made a final decision from which an appeal has been brought forward to the council.
- (g) “Director” means the director of the water division of the department of environmental services.
- (h) “Division” means the water division of the department of environmental services.
- (i) “File” means to place a document in the possession of the council clerk.
- (j) “Party” means a person entitled to participate in an appeal before the council.
- (k) “Person” means any individual, partnership, joint venture, association, corporation, trust, agency, private or municipal corporation, any political subdivision of the state or of the United States, or any other private entity, governmental entity, including the department, or quasi-governmental entity.
- (l) “Petition for appeal” means a document filed with the council to initiate a non-evidentiary appeal from a final department action.

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(m) “Presiding officer” means the council member designated by the chairperson or the council to preside over some or all aspects of a proceeding.

(n) “Quorum” means a majority of designees authorized pursuant to RSA 21-O:5-a and sitting members of the council that when duly assembled is legally competent or without personal or professional conflict to perform a council responsibility.

(o) “Sitting member” means an individual who has been appointed to the council and to whom the oath of office has been administered, and includes any member of the council whose term has expired until such time as a replacement is appointed, but does not include any member who has resigned from the council, regardless of whether a replacement has been appointed.

Source. #6652-A, eff 12-12-97

### PART Env-WtC 103 COUNCIL ORGANIZATION

#### Env-WtC 103.01 Office Hours and Location.

(a) The council’s office shall be located at the Department of Environmental Services, 6 Hazen Drive, P.O. Box 95, Concord, N.H. 03301-0095.

(b) The council’s office shall be open to the public weekdays, excluding holidays, from 8:00 A.M. to 4:00 P.M.

Source. #6652-A, eff 12-12-97

Env-WtC 103.02 Responsibilities of the Wetlands Council. The responsibilities of the council shall include the following:

(a) Reviewing proposed rules of the department pursuant to RSA 21-O:5-a, VI; and

(b) Hearing and deciding appeals from final department actions pursuant to RSA 482-A:10, IV through VIII.

Source. #6652-A, eff 12-12-97

#### Env-WtC 103.03 Responsibilities of Council Clerk.

(a) The council clerk shall perform the record-keeping, correspondence, and other statutory functions of the council on a day-to-day basis.

(b) The council clerk shall be responsible for receiving correspondence, filings, and other communications and documents in the name of the council and shall be custodian of the council’s records.

(c) The council clerk shall prepare and maintain a calendar of all appeals pending before the council.

Source. #6652-A, eff 12-12-97

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Env-WtC 103.04 Quorum. The council shall have a quorum to convene a meeting to discuss or act upon a matter within the council's jurisdiction.

Source. #6652-A, eff 12-12-97

### PART Env-WtC 104 PUBLIC INFORMATION

Env-WtC 104.01 Record of Council Actions. Minutes shall be kept of council meetings and official actions taken by the council. Minutes of council actions which are not confidential under RSA 91-A:3, II or RSA 91-A:5 shall be public records and shall be available for inspection during the council's ordinary office hours within 144 hours from the close of the meeting or vote in question unless the 72 hour availability requirement of RSA 91-A:3, III is applicable.

Source. #6652-A, eff 12-12-97

Env-WtC 104.02 Custodian of Records. The council clerk shall respond to requests to examine those records which are subject to public inspection or which may otherwise be properly examined by the person requesting access.

Source. #6652-A, eff 12-12-97

Env-WtC 104.03 Copies of Records. Any person desiring a copy of a council record shall make a request which identifies as particularly as possible the information being sought and agrees to pay a copying fee of \$.10 per page. If records are requested which contain both public and confidential information, the council shall delete the confidential information and provide the remaining information.

Source. #6652-A, eff 12-12-97

### CHAPTER Env-WtC 200 PRACTICE AND PROCEDURE

#### PART Env-WtC 201 PURPOSE, APPLICABILITY, FAILURE TO COMPLY AND WAIVER

Env-WtC 201.01 Purpose. The purpose of this chapter is to provide procedural rules to implement the statutory responsibilities for all matters under the jurisdiction of the wetlands council created by RSA 21-O:5-a.

Source. #6652-B, eff 12-12-97

Env-WtC 201.02 Applicability. Any person who becomes a party to an appeal under the jurisdiction of the wetlands council or who appears before the council shall comply with these rules.

Source. #6652-B, eff 12-12-97

Env-WtC 201.03 Failure to Comply with Rules or Orders. Failure to comply with a rule of this chapter or order issued thereunder shall be a basis for the council to:

(a) Where the failure involves a noncompliant document which was submitted with the intent to file with the council, refuse to accept such a document for filing;

(b) Where the failure involves a noncompliant petition or motion, deny or conditionally deny such a petition or motion; or

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(c) Where the failure involves any other issue involving noncompliance with a rule in this chapter, issue an order adverse to the person.

Source. #6652-B, eff 12-12-97

### Env-WtC 201.04 Waiver of Rule.

(a) The council, upon its own initiative or upon request by a party, shall waive the application of any of these rules not mandated by statute after notice to all affected persons and a finding that good cause for the proposed waiver exists.

(b) A waiver request shall:

- (1) Be made by written motion or entered orally into the record at a hearing;
- (2) Clearly identify the rule in question and state the specific reasons which support the requested waiver; and
- (3) Certify that all parties have received notice of the request.

(c) In determining if good cause exists to waive a rule, the council shall consider whether:

- (1) Strict adherence to the rule will cause hardship;
- (2) Waiver will prejudice the interests of any party to the proceeding or be detrimental to the public interest responsibilities of the council; and
- (3) Neglect or misfeasance by the petitioner contributed to the need for the waiver.

Source. #6652-B, eff 12-12-97

## PART Env-WtC 202 TIME PERIODS

### Env-WtC 202.01 Computation of Time.

(a) All time periods established in these rules shall be calculated in calendar days.

(b) A time period specified in these rules shall begin with the day after the triggering act or event, and shall include the last day of the period.

(c) If the last day of the time period falls on a Saturday, Sunday, or state legal holiday, then the time period shall be extended to include the first business day following the Saturday, Sunday, or state legal holiday.

Source. #6652-B, eff 12-12-97

Env-WtC 202.02 Date of Issuance of Council Order. All orders, decisions, notices, or other written correspondence or documents issued by or at the direction of the council shall be deemed issued on the date noted on the document.

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Source. #6652-B, eff 12-12-97

Env-WtC 202.03 Change in Allowed Times. Except where a time period is fixed by statute, the council may, on its own initiative or by motion of any party, enlarge or shorten the time provided for the filing of any document, or advance or postpone the time set for any hearing, conference or other activity with notice to all affected parties.

Source. #6652-B, eff 12-12-97

Env-WtC 202.04 Motions to Extend Time.

(a) Any person may ask the council to extend any time limit established by these rules if meeting the prescribed time limit would unduly burden the person or if an extension is otherwise necessary to conduct a more effective hearing.

(b) A request for an extension of time shall be made as a formal motion before the expiration of the prescribed period in accordance with Env-WtC 205.11.

(c) All parties to the proceeding shall be given an opportunity to object as provided in Env-WtC 205.11.

(d) If there is no objection, and if the council determines that the delay would not prejudice the interests of any party to the appeal, and if there is no statutory conflict, the council shall grant the requested extension. If an objection is filed, the council shall consider the reasons for and against the requested extension in reaching its decision.

Source. #6652-B, eff 12-12-97

### PART Env-WtC 203 FILING AND SERVICE OF DOCUMENTS

Env-WtC 203.01 Filing of Documents.

(a) All documents filed with the council, and all correspondence and other communications intended for the council, shall be addressed to the council in care of the council clerk, and shall be mailed or hand-delivered to the council at the location given in Env-WtC 103.01(a).

(b) All communications with the council shall identify the name and address of the communicator.

(c) All written documents governed by these rules shall be deemed filed with or received by the council on the actual date of receipt by the council clerk.

Source. #6652-B, eff 12-12-97

Env-WtC 203.02 Signature Requirements.

(a) All petitions, motions, and other documents filed with the council in connection with an appeal shall be signed and dated by the proponent of the document or, if the party appears by a representative, by the representative.

(b) The signature on a document filed with the council shall constitute a certification that:



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- (1) The signer has read the document;
- (2) The signer is authorized to file it;
- (3) To the best of the signor's knowledge, information, and belief, there are good grounds to support it; and
- (4) The document has not been filed for purposes of delay or harassment.

Source. #6652-B, eff 12-12-97

### Env-WtC 203.03 Number of Copies Submitted.

(a) The original and one copy of any document required or allowed by these rules to be filed in conjunction with an appeal shall be filed with the council, and an additional copy shall be served on the bureau administrator.

(b) Notwithstanding (a), above:

- (1) In the case of a petition for appeal, the original and 12 copies shall be filed with the council, with an additional copy each served on the director, bureau administrator, and the commissioner of the department; and
- (2) In the case of any legal memorandum filed in support of or in opposition to an appeal, 4 copies shall be filed with the council, one copy served on the bureau administrator, and any additional copies filed with the council, at its request.

Source. #6652-B, eff 12-12-97

### Env-WtC 203.04 Service on Parties to the Appeal.

(a) The person filing any document with the council in conjunction with an appeal shall send a copy to all parties who have filed an appearance with the council and to any person who has a motion to intervene pending before the council. Said copy shall be sent by first class mail or hand-delivered on or before the date of filing with the council.

(b) All notices, orders, decisions, or other documents issued by the council in the course of an appeal shall be served by the council upon all parties to the proceeding by mail or in-hand delivery.

(c) When a party has appeared by a representative, service shall be upon the representative. However, timely service which is actually received by a party shall be sufficient regardless of whether the party's representative was also served.

(d) Every document filed with the council, and required to be served upon the parties to an appeal, shall be accompanied by a certificate of service, signed by the person making service, attesting to the method and date of service, and the persons served.

Source. #6652-B, eff 12-12-97

## PART Env-WtC 204 APPEARANCES BEFORE THE COUNCIL

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### Env-WtC 204.01 Appearances.

(a) Subject to (d), below, all interested persons who are eligible and wish to participate in the hearing on appeal or to receive notice of proceedings, filings, or decisions shall file a written appearance with the council.

(b) The appearance shall:

(1) Identify the name and address of the person to whom further communication shall be sent;

(2) Specify the person's interest in the matters addressed by the appeal; and

(3) Specify whether the person intends to participate in the hearing or whether the person only wants to receive notice of filings or decisions, and if so, which filings and/or decisions.

(c) An appearance may be filed at any time before or at the hearing on appeal.

(d) The appellant and the department shall be deemed to have filed an appearance.

(e) A municipal conservation commission shall be deemed to have filed an appearance if it complied with RSA 482-A:11, III in the preceding matter before the wetlands bureau.

Source. #6652-B, eff 12-12-97

### Env-WtC 204.02 Representatives.

(a) Any party to an appeal or other matter before the council may be represented by an attorney licensed to practice law in New Hampshire or such other individual as the party designates.

(b) Any party who wishes to be represented shall submit to the council a written authorization for the representation that is signed by the party and the representative. The authorization shall identify the name, address, and telephone number of the individual who will be representing the party, his or her relationship to the party and professional affiliation.

(c) All representatives shall obtain and become familiar with these procedural rules before appearing before the council.

(d) The council shall prohibit an individual from acting as a representative before the council for a pending matter when it finds that the individual:

(1) Has engaged in behavior that is disruptive to the orderly conduct of the council's business; or

(2) Has shown a consistent or recurring failure to meet deadlines.

(e) Before the council imposes a prohibition against a representative, the representative shall be given notice of the proposed prohibition and shall be provided an opportunity to address the council regarding why the prohibition should not be imposed. The council shall also provide an opportunity to comment on the proposed prohibition to the party represented and all other parties to the proceeding.

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- (f) Nothing in this section shall be construed to permit the unauthorized practice of law.

Source. #6652-B, eff 12-12-97

### PART Env-WtC 205 APPEAL PROCEDURES

#### Env-WtC 205.01 Applicability.

- (a) The procedures set forth in this part shall apply to all appeals to the council pursuant to RSA 482-A:10.

(b) The conduct of hearings held by the council to provide information and receive public comment on rulemaking and other matters before the council shall be governed by the non-adjudicatory hearing provisions of Env-C 203.

Source. #6652-B, eff 12-12-97

#### Env-WtC 205.02 Filing a Petition for Appeal.

- (a) An appeal shall be initiated by filing a petition for appeal in the manner required by (b), below, within 30 days of the date on which the decision being appealed was issued.

(b) A petition for appeal shall be addressed to the chairperson of the council and sent by certified mail to the council's office at the location given in Env-WtC 103.01(a).

(c) The appellant shall send a complete copy of the petition for appeal to each person who participated in the reconsideration proceeding before the department and to all persons identified in Env-WtC 205.09(c).

Source. #6652-B, eff 12-12-97

Env-WtC 205.03 Contents of Petition for Appeal. A petition for appeal shall include the following in the order specified:

- (a) The exact legal name of each person seeking relief and the person's address;
- (b) A detailed description of the land involved in the department's decision;
- (c) Identification of the department's decision on reconsideration and underlying permit decision or order by the names of the parties, permit or order number, and the division's applicable file number and name if available. Copies of the reconsideration decision, permit decision, or order and the department's findings in support of its decision on reconsideration shall be attached to the notice in a labeled appendix;
- (d) A clear and concise statement of the relief sought, specifying every ground upon which it is claimed that the decision complained of is unlawful or unreasonable;
- (e) A concise and explicit statement of the facts and the statutory provisions upon which the council is asked to rely in granting relief;

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(f) A brief statement indicating the complexity of the issues presented to the council and the volume of the record below; and

(g) Certification that a copy of the notice of appeal was delivered to all interested persons as required by Env-WtC 205.02(c), above, specifying the name and address to whom each copy was delivered and the date and manner sent.

Source. #6652-B, eff 12-12-97

### Env-WtC 205.04 Docketing the Appeal.

(a) Upon receipt of a petition for appeal, the council clerk shall assign a docket number to the appeal and shall distribute a copy of the petition for appeal to each member of the council.

(b) The docket number assigned by the council clerk shall be used by all parties to identify all motions, filings, and other documents relating to the appeal subsequently submitted to the council.

Source. #6652-B, eff 12-12-97

### Env-WtC 205.05 Determining Adequacy of Petition.

(a) The council clerk, in consultation with the chairperson or designated council member as necessary, shall immediately review a petition for appeal to determine compliance with Env-WtC 203, Env-WtC 205.02, and Env-WtC 205.03.

(b) The council clerk shall notify the appellant in writing of any other deficiencies in the form of the submittal and shall instruct the appellant to cure all deficiencies within 15 days.

(c) Noncompliance with any requirement of Env-WtC 205.03 shall require submittal of a revised petition for appeal and renotification in accordance with Env-WtC 205.02(c).

Source. #6652-B, eff 12-12-97

### Env-WtC 205.06 Replies and Motions to Dismiss.

(a) Any party who has filed an appearance in accordance with Env-WtC 204.01 may file a reply to a petition for appeal or a motion to dismiss within 15 days from the service date of the petition.

(b) The reply or motion to dismiss shall:

- (1) State whether the party supports or opposes the appeal;
- (2) Describe the action which the party wishes the council to take;
- (3) Summarize the facts and law that warrant the council taking the requested action; and
- (4) Where appropriate, specify grounds for summary dismissal of the petition for appeal or any part thereof.

Source. #6652-B, eff 12-12-97

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Env-WtC 205.07 Summary Dismissal. A petition for appeal shall be summarily dismissed for the following reasons:

(a) A deficiency in the form of the petition which is not cured as required by Env-WtC 205.05(b);

(b) The petition was not filed within the time provided in Env-WtC 205.02(a);

(c) The council lacks jurisdiction to preside over the particular appeal, such as an appeal of an order or action of the department including the following:

(1) An interlocutory order;

(2) Any nonfinal action;

(3) An administrative action; or

(d) The petition fails to identify facts or law that provide a basis for the relief sought.

Source. #6652-B, eff 12-12-97

Env-WtC 205.08 Preparation of Department's Record.

(a) Unless otherwise ordered by the council, the department shall prepare the record of the decision appealed from and shall file 2 copies of the record with the council within 15 days from the date that the council accepted a petition for appeal.

(b) The department's record shall contain all information relevant to the appeal that was available to the department at the time it made its decision.

(c) The record required by (b), above, shall:

(1) Be organized in reverse chronological order;

(2) Have each page numbered in sequential order;

(3) Contain copies of all documents and other information considered by the department in making its underlying permitting decision or order, including each submittal made by or on behalf of the party appealing and where a hearing on reconsideration or other public hearing was held, all evidence and testimony presented at such hearing; and

(4) Include an index of all material in the record, with each item in the record described by date, type of document, creator, and recipient.

(d) All photographs in the record shall be provided as clear reproductions, provided that when an original photograph in the bureau record is in color, each copy submitted to the council shall also be in color. Oversized plans may be submitted in reduced size, if legible.

(e) Parties dissatisfied with the contents of the department's record shall file a motion seeking to supplement the record that the council receives prior to the hearing. The council shall grant a motion to

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supplement to the extent the materials to be added were contained in the division's files relating to the matters on appeal or were in fact considered by the department during proceedings below.

(f) A copy of the department's record shall be available for public use and copying at the council's office throughout the pendency of the appeal proceedings.

Source. #6652-B, eff 12-12-97

### Env-WtC 205.09 Notice of Appeal Proceedings.

(a) At its next regularly scheduled meeting, the council shall consider the petition and any replies to the petition or motions to dismiss before issuing an order to commence or dismiss an appeal proceeding. An order to commence an appeal proceeding shall not be a final order of the council even if it excludes, modifies, or expands upon issues raised in the petition for appeal.

(b) Upon issuance of an order to commence an appeal proceeding, the council clerk shall prepare a notice of appeal proceedings that:

- (1) Establishes the date, time, and place of the hearing on appeal;
- (2) Explains that the hearing is to consider the issues raised in the notice of appeal, states the legal authority under which the hearing is to be held, and identifies the particular statute(s) and/or rule(s) involved in the appeal;
- (3) Informs all persons of their obligation to file a written appearance with the council as provided in Env-WtC 204.01 in order to receive further notice of proceedings relating to the appeal and to participate in the hearing;
- (4) States when and where the department's record will be available for review and copying;
- (5) Establishes a deadline for motions to supplement the record in accordance with Env-WtC 205.08(d) and motions to intervene; and
- (6) Sets a schedule for submittal of memoranda in support of or in opposition to the appeal.

(c) The council clerk shall send a copy of the council's order to commence an appeal with the notice of appeal proceedings, or the council's order to dismiss an appeal, to each interested person.

(d) When a hearing on appeal is rescheduled, the council shall provide notice of the rescheduled hearing in accordance with RSA 482-A:8 and RSA 482-A:9 in addition to all parties that have filed an appearance.

Source. #6652-B, eff 12-12-97

### Env-WtC 205.10 Intervenors.

(a) Any person whose rights might be directly affected by the outcome of the appeal shall be entitled to intervene in the appeal proceedings.

(b) Any person seeking to intervene shall file a motion to intervene, stating with particularity:

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- (1) The basis for the intervenor's interest in the appeal;
- (2) The nature of the intervenor's alleged aggrievement; and
- (3) The nature and amount of the intervenor's participation and involvement in the underlying action from which the appeal has been made.

(c) The council's order on a motion for intervention shall specify the extent to which the intervenor shall be considered a party for purposes of these rules.

(d) All persons noticed in accordance with Env-WtC 205.09(c) shall be deemed parties and shall only be required to file an appearance as provided in Env-WtC 204.01 to participate in the appeal.

Source. #6652-B, eff 12-12-97

### Env-WtC 205.11 Motions.

(a) All motions shall be in written form unless the nature of the relief requested requires that the motion be made spontaneously in the context of an oral proceeding. Written motions shall be included in the record of the appeal proceedings. Oral motions shall be recorded in full in the minutes or on the tape of the hearing.

(b) All motions shall contain a clear and concise statement of the facts and law which support the motion and shall state the specific relief or ruling requested.

(c) All parties who would be adversely affected by the ruling sought in a motion shall have an opportunity to respond to the motion. For written motions, responses shall be in writing and shall be filed not later than 5 days after receipt of the motion. For oral motions, responses shall be made during the hearing at which the oral motion was made unless the presiding officer determines, based on the nature of the motion, that it is appropriate to grant additional time to prepare a response to the motion.

(d) An objection shall state clearly and concisely the action which the party filing the objection wants the council to take on the motion and any facts and law relied upon in opposition to the motion.

(e) The moving party shall have the burden of persuasion on all matters raised in the motion.

Source. #6652-B, eff 12-12-97

Env-WtC 205.12 Submittal of Written Argument. Unless otherwise ordered by the council, the parties to an appeal shall present written argument to the council as follows:

(a) The appellant shall file a memorandum that summarizes all facts relevant to the matters raised on appeal and clearly and succinctly presents all legal arguments on which it relies in support of its appeal within 30 days of the mailing of the notice of appeal proceedings;

(b) The department may file a memorandum in support of its decision within 30 days of the filing date of the appellant's memorandum;

(c) Any party may file a memorandum for consideration by the council before the deadline for submittal of the department's memorandum; and

(d) Memoranda shall be filed in accordance with Env-WtC 203.

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Source. #6652-B, eff 12-12-97

### Env-WtC 205.13 Order and Length of Oral Argument.

- (a) The appellant and the department shall each be allowed 30 minutes. The appellant shall present argument first, followed by the department.
- (b) Subject to the waiver rules in this chapter, all other parties shall each be allowed 5 minutes. The order of argument by other parties shall be determined at the prehearing conference subject to reconsideration for good cause by the council before the hearing on appeal.
- (c) The time allotted in this section for oral argument shall be shortened by the council on its own initiative when the nature of the issues to be decided so warrants.
- (d) The parties may, by motion, request additional time for argument.
- (e) The parties shall make oral arguments based upon the nature, scope, and quality of the evidence in the department's record and shall reference all significant facts to the record by page or index number.
- (f) Oral argument shall be conducted in the general manner of appellate court proceedings. The presiding officer, and council members subject to recognition by the presiding officer, but not the parties, shall have the opportunity to ask questions of the presenting party as necessary to develop a sound record for decision.
- (g) Parties may reserve some of their allotted time for rebuttal argument.

Source. #6652-B, eff 12-12-97

### Env-WtC 205.14 Prehearing Conference.

- (a) Any party requesting a prehearing conference shall be entitled to such conference in accordance with this section.
- (b) Each party shall receive written notice of the prehearing conference and shall be entitled to participate in the prehearing conference.
- (c) Where applicable, the presiding officer at the prehearing conference shall:
  - (1) Make preliminary rulings subject to review and approval by the council on motions pending before the council, including:
    - a. Motions for intervention;
    - b. Motions to supplement the record in accordance with Env-WtC 205.08(d); and
    - c. Motions to change standard hearing procedures.
  - (2) Determine the order in which parties other than the appellant and the department shall present argument at the hearing on appeal;



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- (3) Preside over offers of settlement and discussion of simplification of the issues presented on appeal;
- (4) Schedule or revise deadlines for the submittal of motions, legal memoranda, and proposed orders to the council; and
- (5) Consider any other matter which might contribute to the prompt and orderly conduct of the appeal proceedings.

Source. #6652-B, eff 12-12-97

### Env-WtC 205.15 Supplemental Arguments or Hearings.

(a) The provisions of this part shall not limit the council's authority to structure individual proceedings in a manner suitable to their particular subject matter and due process requirements, to require submittal of supplemental argument or to schedule additional hearings or conferences.

(b) An order scheduling supplemental argument, or otherwise reopening the record, may be issued by the presiding officer at any time prior to the issuance of a final order in a proceeding.

Source. #6652-B, eff 12-12-97

### Env-WtC 205.16 Record Considered on Appeal.

(a) The council shall decide appeals based upon the department's record, applicable department rules, and applicable statutes and case law. Information that was not available to the division shall not be considered by the council, and testimony or other evidence presented to the department shall not be repeated in any appeal proceeding before the council.

(b) Oral proceedings addressing the merits of the case shall be limited to oral argument conducted pursuant to Env-WtC 205.13.

(c) Portions of the department's record may be used as demonstrative exhibits during oral argument before the council.

Source. #6652-B, eff 12-12-97

### Env-WtC 205.17 Burden of Proof.

(a) The appellant shall bear the burden of proving, by a preponderance of the evidence, that the department's decision being appealed was:

- (1) Unlawful; or
- (2) Unreasonable.

(b) Findings of the department upon questions of fact properly before it shall be accepted by the council as reasonable unless the appellant or other party specifically rebuts a finding as unreasonable given the information available to the department at the time it made the finding.

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(c) For motions, waiver requests, and other non-dispositive matters, the party asserting the truth of a statement shall bear the burden of proving, by a preponderance of the evidence, that the statement is true.

(d) For purposes of this section, proof by a preponderance of the evidence means that what is sought to be proved is more probable than not.

Source. #6652-B, eff 12-12-97

### Env-WtC 205.18 Record of Appeal Proceedings.

(a) The record of the appeal proceedings shall include:

- (1) All orders and notices issued by the council or presiding officer relating to the appeal;
- (2) The audio tape recording and/or minutes of the hearing(s);
- (3) The department's record;
- (4) All motions, memoranda, proposed orders, and other written materials submitted by the parties; and
- (5) The council's decision on appeal.

(b) All oral argument shall be recorded. The council, upon request of a party, shall provide, at cost, a duplicate tape of the hearing. Any person desiring a transcript of the hearing prepared by a qualified stenographer shall provide the stenographer and shall bear all expenses associated with the preparation of the transcript.

Source. #6652-B, eff 12-12-97

### Env-WtC 205.19 Continuance.

(a) Any party may request that a hearing conducted pursuant to this part be continued for reasonable cause and reconvened or rescheduled. Reasonable cause shall include, but not be limited to, unavailability of an individual party or a representative, or that the parties believe that an informal resolution is possible and need more time to resolve the matter.

(b) A request for a continuance of a hearing made in advance of the hearing shall be in writing, shall state the reason(s) for the request, and shall be filed at least one week before the scheduled hearing date. Requests for a continuance made at a hearing may be made orally and shall be entered in the record of the hearing.

(c) If the council determines that reasonable cause exists and that no party will be prejudiced by the delay, the council shall grant the request. The council may reschedule a hearing on its initiative for administrative need.

(d) All orders for continuance shall specify the time and place at which the hearing shall be reconvened. The council shall provide notice of a rescheduled hearing on the appeal in accordance with Env-WtC 205.09(e) and of other related hearings in such a manner as is appropriate to ensure that reasonable notice of at least 10 days shall be given of the time and place of the continued hearing.

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Source. #6652-B, eff 12-12-97

Env-WtC 205.20 Failure to Appear. The council shall hear evidence and testimony of all parties who are present at a hearing and shall render a decision thereon, subject to the provisions of Env-WtC 205.21, where:

(a) One or more parties to whom notice of a hearing has been given in accordance with these rules fails to appear and fails to advise the council of such non-appearance prior to the hearing; and

(b) The council determines that delaying the hearing to a later date would cause undue inconvenience or prejudice to a party present at the hearing.

Source. #6652-B, eff 12-12-97

Env-WtC 205.21 Reconvening of Hearings.

(a) If a hearing on appeal is held in a party's absence pursuant to Env-WtC 205.20, the party may file a motion within 10 days after the date of the hearing to reconvene the hearing.

(b) The motion shall:

(1) State the reason(s) why the party was absent from the hearing;

(2) State why the council was not notified of the absence in advance of the hearing; and

(3) Be supported by affidavits or other objective evidence.

(c) If the council determines that good cause exists to explain the party's failure to appear at the hearing and to explain the party's failure to notify the council in advance of the hearing, the council shall reconvene the hearing by scheduling another hearing. Good cause shall include accident, sudden illness, death of a family member, or other circumstance beyond the control of the party which prevents the party from attending the hearing and from notifying the council.

Source. #6652-B, eff 12-12-97

Env-WtC 205.22 Recess and Adjournment. The council shall, from time to time, at the request of any party or on its own initiative, recess or adjourn any hearings as might be necessary for the orderly conduct of the proceeding.

Source. #6652-B, eff 12-12-97

Env-WtC 205.23 Ex Parte Communications with Council Members.

(a) No person shall communicate in any form any information pertaining to the subject matter of a pending appeal with any council member except where all parties had notice and an opportunity to participate.

(b) Any member of the council receiving any direct communication from any person which pertains to the subject matter of a pending appeal, at the next council meeting, shall notify the council

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chairperson on the record of the communication and submit a copy of the same or, if the communication was made orally, relate the substance of the communication to the council.

(c) No information shall be considered by the council or made part of the record in any appeal that is not presented to the council in accordance with the provisions of this part.

Source. #6652-B, eff 12-12-97

### PART Env-WtC 206 RECONSIDERATION

#### Env-WtC 206.01 Motion for Reconsideration.

(a) An order of the council shall not be final until the council issues a written decision to the appellant and division by service pursuant to Env-WtC 203.04(b).

(b) Motions seeking reconsideration of a final adjudicative order of the council shall be filed within 20 days of the date the written decision is issued.

(c) A motion for reconsideration shall:

(1) Identify each error of fact, error of reasoning, or erroneous conclusion contained in the final order which the moving party wishes reconsidered;

(2) Concisely state the correct facts referenced to the department's record, correct legal reasoning and correct conclusion urged by the moving party; and

(3) Include any memorandum of law the moving party wishes to submit.

(d) The council shall, no later than its first regularly scheduled meeting following receipt of a motion to reconsider, grant or deny the motion.

(e) Subject to (d), above, the council shall grant the motion or any part thereof, and schedule a reconsideration hearing, to the extent the motion reveals errors of law or fact in the council's prior decision. A hearing on reconsideration shall be limited to the issues raised in the motion for reconsideration.

(f) The council shall provide notice to affected persons of the record of the hearing on reconsideration.

Source. #6652-B, eff 12-12-97

Env-WtC 206.02 Reconsideration on the Council's Own Motion. Within the time frame specified in Env-WtC 206.01(b), the council may reconsider, revise, or reverse any final action on its own motion.

Source. #6652-B, eff 12-12-97

### PART Env-WtC 207 PRESIDING OFFICER

#### Env-WtC 207.01 Designation of Presiding Officer.

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- (a) Council proceedings shall be conducted by a presiding officer.
- (b) The chairperson of the council shall serve as the presiding officer if present and willing to preside or shall designate another qualified member of the council to so serve with the concurrence of the council.

Source. #6652-B, eff 12-12-97

### Env-WtC 207.02 Authority of Presiding Officer.

- (a) The presiding officer shall:
  - (1) Regulate the course of the conference or hearing;
  - (2) Rule upon issues of procedure; and
  - (3) Take such other action as necessary for the efficient and orderly conduct of the hearing, consistent with these rules and any other applicable law.
- (b) The presiding officer shall open the conference or hearing by describing in general terms the purpose of the conference or hearing and the general procedures governing its conduct, and shall then proceed in accordance with these rules.

Source. #6652-B, eff 12-12-97